FEDERAL MEDIATION AND CONCILIATION SERVICE

ARBITRATION AWARD

IN THE MATTER OF ARBITRATION	)	
	)	
Between	)	
	)	**FMCS# 16-52548**
ZUP'S of AURORA	)	
	)	
and	)	
	)	**John Remington,**
	)	**Arbitrator**
UFCW # 1189	)	
	)	
	)	

THE PROCEEDINGS

The above captioned parties, having been unable to resolve three grievances over the closing of their work location, selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and under the rules and procedures of the Federal Mediation and Conciliation Service, to hear and decide the matter in a final and binding determination. Accordingly, a hearing was held on August 22, 2016 in Eveleth, Minnesota at which time the parties were represented by counsel and were fully heard. Oral testimony and documentary evidence were presented; no stenographic transcription of the proceedings was taken; and the parties made oral closing arguments on the record and subsequently filed supplemental documentation following the close of the hearing.

The following appearances were entered:

For the Company:

Donald C. Erickson	Fryberger, Buchanan, Smith and Frederick Duluth, MN
James Zupancich	President, Zupancich Bros. Babbitt-Aurora

For the Union:

Timothy W. Andrew	Andrew and Bransky, P.A. Duluth, MN
Tom Cvar	Union Representative

THE ISSUES

The parties agreed in principle that there are three separate issues involved in this dispute:

1) **Are employees with four (4) or more years of service and employed at the closing of the Aurora store in December of 2015, entitled to severance pay and, if so, how much.**

2) **Did the Employer violate the parties' collective agreement when it laid off Grievant Karole Eilola on December 29, 2015 while continuing to employ less senior employees and, if so, what shall the remedy be?**

3) **Are employees with six (6) months or more of seniority as of the closing of the store in December of 2015 entitled to vacation benefits and, if so, how much?**

BACKGROUND

Zup's of Aurora, hereinafter referred to as the "EMPLOYER" operated a food market/ grocery store in Aurora, Minnesota for approximately twenty-five years until it was permanently closed on December 31, 2015. Zup's of Aurora was one of a number of grocery stores located in Northeastern Minnesota operated by Zupancich Brothers Inc., hereinafter referred to as the "COMPANY." Many, but not all, of the Company's grocery employees are represented by the United Food and Commercial Workers Union and its Local #1189, hereinafter referred to as the "UNION." While many of the Company's stores are unionized, the collective bargaining between the Employer and the Union is unique to the Aurora store and its employees. The Babbitt store, the only other store operated by Zupancich Brothers of Babbitt-Aurora Incorporated, is non-union.

At some point in late 2015, the Employer determined that the Aurora store was no longer financially viable and determined to close it permanently. Employees were advised of this anticipated closure and further advised that there might be alternative employment at other Company stores, particularly those stores located in Silver Bay, MN, Tower, MN and Cook, MN. None of these stores is covered by a collective bargaining agreement identical in terms of wages and hours to the Aurora store. Ultimately, the Employer advised the Aurora employees that only the Cook store would have openings. Notice of these openings was communicated through a memorandum under Zup's letterhead dated December 21, 2015, as follows:

> To: Zup's Aurora Employees
> Re: Available work positions
>
> This letter is to inform you that we will have several openings in our Cook store for cashier and meat department positions. You will receive your earned vacation, although

> the positions available will have no set shifts and you will be working every other weekend. Once you switch from one store to another, you will lose your seniority, but not your length of service. Your wages will be based on Cook's wage scale, with years of service.
>
> If you are interested in transferring, please contact Matt (Zupancich) at 218-666-0205 or Jim (Zupancich) at 218-365-3188.
>
> Sincerely,
> Jim Zupancich

Aurora employees continued to work at the Aurora store through December 31, 2015 at which point the store was permanently closed for regular business. However, one Aurora store employee, Grievant Karole Eilola, was not scheduled to work on December 30 or 31. When she requested to work those days she was told there was no work available. However, at least two employees junior to Eilola in seniority did work on December 30 and 31, 2015.

Grievance #2015-000241 was filed by Union representative Tom Cvar on December 28, 2015 via certified letter from Cvar to Zup's Aurora Supervisor Joe Jamnick. This grievance states, in relevant part:

> No employees have been offered employment at another store within a reasonable driving distance from Aurora. Nor have the employees been offered severance pay due to the closing of the store.
> This action is in violation of the current Collective Bargaining Agreement, Article Addendum A article store closing, sections 1-12 and all applicable articles and provisions.
> ……

In remedy the Union requests that all impacted employees be made whole and that the Employer meet with the Union to resolve the matter.

Grievance #2015-000240 was also filed by certified mail on December 28, 2015 alleging that employee Karole Eilola was denied employment at Zup's of Aurora on or about 12/28/2015 in violation of Article 10, Section 10.03 of the collective agreement. This grievance also asks that Grievant Eilola be made whole.

Grievance #2016-000005, a class action grievance, was filed on January18, 2016 by certified mail from Cvar to Jamnick. This grievance alleges that employees were not paid their earned or accrued vacation hours upon the store's closing on December 31, 2015 in violation of Article 8 and all other applicable provisions of the contract. It further states that this violation "was brought to the Union's attention on or about 1/15/2016." This grievance requests that the Employer forward copies of all documentation related to the Employer's decision not to pay for earned and/or accrued vacation hours and all supporting evidence and related policies, and requests a meeting with the Employer to resolve this matter. There is nothing within the record to show that the Employer responded to any of the above grievances.

Apparently the parties attempted to resolve the above grievances during early 2016 but were unable to reach agreement. An arbitration hearing was then set by the parties for August 22, 2016. The parties agree that the above three grievances are properly before the Arbitrator for final and binding determination.

PERTINENT CONTRACT PROVISIONS

ARTICLE 8
VACATIONS

8.1 Employees who have been employed by the Employer for a period of one (1) year or more shall receive one (1) weeks' vacation with pay. Employees who have been

employed by the Employer for three (3) years or more shall receive two (2) weeks' vacation with pay. Employees who have been employed by the employer for a period of ten (10) years or more shall receive three (3) weeks of vacation with pay.

Appendix C

The following Articles and Sections will apply to all employees hired prior to April 14, 2002.

Article 8. Vacation

8.1 Full-time employees who have been employed by the Employer for a period of one (1) year or more shall receive (1) weeks' vacation with pay. Full time employees who have been employed by the Employer for two (2) years or more shall receive two (2) weeks' vacation with pay. Full time employees with seven (7) years of service or more with the Employer shall receive three (3) weeks' vacation with pay. Full time employees with fifteen (15) years of service or more with the Employer shall receive four (4) weeks' vacation with pay.

8.3 Part time employees working under thirty (30) hours per week shall be entitled to vacation of one (1)week with pay after the first year, two (2) weeks after the second year,k three (3) weeks after the seventh year, and four (4) weeks after the fifteenth (15) year, with their pay to be based on the average number of hours worked on a weekly basis during the year.

8.2 Employees with six (6) months or more of continuous service with an Employer who quit, are laid off or dismissed, except dismissal for cause, shall be entitled to pro-rated vacation. Such pro-rated vacation to be based on the length of time an employee served from the date of employment during the first year and thereafter the length of time an employee served since his/her last anniversary date of employment, pro-rated.

……

8.5 Vacation pay for (sic) shall be at the employee's straight time rate and shall be based upon the average number of hours worried for each week in the preceding

year for each week of vacation to which the employee is entitled, inclusive of overtime.

……

8.7 An employee absent from work because of workman's compensation, injury, accident, or illness verified by a doctor's certificate, if requested, will have the time absent from work for any one of those reasons counted as time worked for a period of up to two (2) months.

ARTICLE 10
SENIORITY

10.1 Definition. Seniority shall be defined as the length of continuous service with the Employer while working under the jurisdiction of this Agreement.

10.2 Seniority shall prevail in regard to laying off, reduction in hours, and rehiring, provided the employee is qualified to do the work available and works at the contract rate.

10.3 No less senior employee will be scheduled for more hours than a more senior employee except that night stockers may be scheduled on a weekly basis for more or less hours than other employees. The employer can schedule employees up to thirty nine (39) hours a week.

……

Addendum A
Store Closing

Exclusive of single store operations (one store only of a company or owner within geographical boundaries of this area agreement), this memorandum will be considered effective the first day of the month following the ratification of the collective bargaining agreement.

The Employer and the Union agree as follows:

1. In the event the Employer permanently discontinues operations at a store, whose employees are covered by a collective bargaining agreement with the Union, a severance pay shall be paid to eligible employees in the

manner and to the extent set forth in this Agreement. Discontinuance of operations due to fire, flood, or other acts of God shall not be deemed discontinuance of operations by the Employer for any purpose of this Agreement.

2. A regular full time employee having four (4) or more years of continuous full time employment whose employment is terminated on or before the date of the Employer's permanent discontinuance of operations at a store and by reasons of such discontinuance of operations shall be eligible for severance pay except in the following situations:

   (a) The employee voluntarily terminates his/her employment or is discharged for just cause prior to the date operations are discontinued;
   (b) The employee is offered employment at the same location by a successor employer or is offered employment at another location by the Employer or any other Company having this collective bargaining agreement with this Union;
   (c) The employee is eligible for and actually receives benefits under any retirement plan to which the Employer makes contributions on the employee's behalf;
   (d) The employee engages in any conduct which has the effect or is intended to disrupt or otherwise interfere in any way with the Employer's discontinuance of operations.

3. For all purposes of this Agreement, a regular employee is any employee who averaged eighteen (18) or more hours during his/her basic work week for the fifty-two (52) week period immediately preceding his/her termination of employment and continuous employment shall mean one (1) week's pay at the employee's straight time hourly rate based on his/her average weekly hours worked during such fifty-two (52) week period.

4. The amount of severance pay for any employee eligible therefore shall be one (1) week's average pay with a maximum of forty (40) hours' pay for each completed year of continuous employment in excess of four (4) but not to exceed a maximum of six (6) week's pay. Payment of

> severance pay shall be subject to any federal or state withholding requirements.
> 5. Severance pay shall be paid at the rate of one (1) week's pay per week commencing with the second week following the number of weeks or parts thereof for which vacation pay is paid; provided, that any severance pay shall cease in the event the employee is recalled or offered employment by any Employer who is covered by this collective bargaining agreement.
>
> ……

CONTENTIONS OF THE PARTIES

The Employer takes the position that no severance pay is due to employees because all were offered employment at Zup's of Cook, MN. Accordingly, the Employer argues that they are disqualified for severance pay under the provisions of Addendum A, Store Closing, 2.b. cited above. With respect to the grievance of Karole Eilola, the Employer maintains that Grievant was neither qualified nor capable of performing the work available on December 30 and 31, 2015. Finally, the Employer concedes that while accrued vacation pay is due to some employees, the amounts due are less than the amounts proposed by the Union.

The Union takes the position that severance is due to seven (7) employees since none were offered employment under the provisions of this collective bargaining agreement with this Union. It argues that the Cook agreement is not "this agreement" within the meaning of section 2(b) of the Addendum. The Union contends that Grievant Eilola was both qualified and capable of performing available work at the Aurora store on December 30 and 31, 2015 and accordingly is due two (2) day's pay at her straight time

rate. The Union further takes the position that its calculations of vacation pay due are correctly calculated within the meaning of Article 8 of the parties' collective agreement.

DISCUSSION, OPINION AND AWARD

It is readily apparent from the provisions of the collectively bargained Store Closing Addendum A that employees Linda Lund, John Nelson, Kim Sullivan, Karole Eilola, Jeremy Voight, Andrew Rantala and Kim Wick are eligible for, and entitled to receive severance pay. The language of this provision clearly and unambiguously provides at 2(b) that severance is due unless the employee is offered employment at the same location by a successor employer or by any other Company having this collective bargaining agreement with this Union. (Emphasis added.) An offer of employment at the Cook store, the only location that the Employer claimed that employment was available, does not satisfy the requirements of the Addendum because the Cook store is covered by a different collective bargaining agreement which is not comparable to the collective agreement at the Aurora store. Neither are the above seven employees disqualified by the other provisions of the Addendum since none voluntarily terminated, was discharged for cause, retired under a qualified retirement plan, or engaged in any disruptive or interfering conduct related to the closing of the Aurora store.

AWARD

Accordingly, the Arbitrator is compelled to find that the Employer violated the provisions of the parties' collective agreement when it declined to make severance payments to the following individuals:

Employee	Amount Due[1]
Jeremy Voight	$5,110.75
Linda Lund	$4,300.90
Kim Sullivan	$2,798.52
Karole Eilola	$2,796.00
Andrew Rantala	$1,333.45
Kim Wick	$1,023.40
John Nelson	$ 972.00

The above amounts are hereby awarded in remedy.

Karole Eilola

It is also readily apparent from the record that Grievant Karole Eilola was not scheduled for work on December 30 and 31, 2016 in violation of Article 10.3 of the parties' collective bargaining agreement. However, the Employer maintained at the hearing that Grievant was neither qualified to do cashier work nor physically capable of bagging or carrying out. Grievant testified, without rebuttal, that she called in and requested to cashier or bag groceries on December 30 and 31 when she discovered that she had not been scheduled to work. She further testified that her request to work was denied. In this connection, Zup's President, Jim Zupancich, testified that he had no knowledge of Grievant's request to work and had no role in the decision not to schedule her.

The Employer argues that Grievant, who had been primarily employed in the Deli section of Zup's Aurora store, had never been trained as a cashier at Zup's and that such training normally requires eighteen hours of working with an experienced cashier. The Employer therefore contended that it would have been futile to train Grievant as a cashier since the store was closing. This argument is undercut by the fact that Grievant had prior

[1] Amounts submitted by the Union are correct within the meaning of the agreement. The Employer did not contest the severance amounts, only whether or not any severance was due.

experience as a cashier with another employer and the fact that there was still an open offer of employment as a cashier in the Cook store. If this offer of employment was legitimate, then it would have seemed reasonable to train Grievant in the last two days that the Aurora store was open so that she could have transferred to Cook as a cashier.

The Employer also claims that Grievant had previously been injured and was not capable of bagging and carrying out. However, Grievant testified that she had done a substantial amount of lifting and carrying in her Deli position in the Aurora store and that physical restrictions were never mentioned when she was refused the opportunity to work in December of 2015. Given the credible and unrebutted testimony of Grievant, the Arbitrator can only conclude that neither of the above excuses made by the Employer for failing to schedule Grievant was sufficient to justify its refusal to schedule her for work in violation of Article 10.3 of the agreement.

AWARD

It follows that the grievance must be sustained. In remedy Grievant Karole Eilola shall be paid for the 16 hours of work for which she was improperly scheduled off on December 30 and 31, 2016. The amount due her is $208 based on her contractual hourly rate of $13/ per hour.

Vacation Pay

The most contentious matter in this dispute involves the calculation of vacation pay due to employees. While the parties agree that some pay for accrued vacation is due, the parties disagree as to the number and identity of employees entitled to vacation pay; the average number of hours per week worked by those employees; and the number of

weeks of vacation pay due. While the Union maintains that Jeremy Voight is entitled to a substantial amount of pay for accrued vacation, Voight is completely excluded from the Employer's calculation, apparently because he accepted the offer of another position at the Cook store. However, to force Voight to transfer his vacation benefit to the Cook store would reduce the value of his accrued benefit since the wage rate at the Cook store is lower than the contractual rate at Aurora. Accordingly, the Arbitrator finds that he must be included in the vacation pay out from the Aurora store and presumably will qualify for a new vacation benefit at the Cook store.

A review of the data submitted by the respective parties reveals that the analysis and calculations provided by the Union are both more clear and complete than those presented by the Employer and are fully in compliance with the provisions of the parties' collective agreement. These calculations are based on the actual pension hours plus the requirements of Article 8.7. The Arbitrator must therefore adopt the calculations presented by the Union in remedying the Employers failure to make payments for unused vacation as provided for in Article 8 of the collective agreement.

AWARD

The Employer shall make accrued vacation benefits to the following employees, in the following amounts:

Employee	Amount
Linda Lund	$3,154.39
Kim Sullivan	$2,052.28
Karole Eilola	$2,050.62
Jeremy Voight	$1,326.01
John Nelson	$ 712.80
Andrew Rantala	$ 651.26
Jennifer Bowen	$ 239.24
Sarah Hovi	$ 96.02
Kim Wick	$ 54.92

The above amounts are hereby awarded in remedy.

The Arbitrator has made a detailed review and analysis of the entire record in this matter and is satisfied that the disputed issues which arose in these proceedings have been fully addressed above. Further, he notes that there were certain other issues raised that must be deemed immaterial, irrelevant or side issues at the very most and therefore have not been afforded any significant mention, if at all, for example: the fact that there is no distance requirement in the collective bargaining agreement limiting the Employer's ability to offer alternative positions; whether or not the Employer ever offered alternative positions in Silver Bay or Tower; Eilola's former medical restrictions; whether or not the positions available in Cook were part-time; and so forth.

_____

John Remington, Arbitrator

September 23, 2016

St. Paul, Minnesota